IN THE

Supreme Court of the United States.

OCTOBER TERM, 1885.

THE NEW YORK LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

THOMAS C. FLETCHER, as EXECUTOR of CHINONDA S. ALFORD, Deceased.

No. 184

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

STATEMENT.

The business of insurance in Missouri is under State supervision. No corporation nor association of individuals, whether incorporated under the laws of that State or any other, can transact insurance business in Missouri, except upon complying with the terms and conditions of the insurance laws. Those laws are in Chap 119, 2 Rev. Stat. of Mo. of 1879.

By Sec. 5920 the insurance department is charged with the execution of all laws in relation to insurance and insurance companies doing business in the State.

"No insurance company, not incorporated by or organized under the laws of this State, can transact any insurance business by an agent or agents in this State, unless it first file, in the office of the Superintendent of the Insurance Department, a duly certified copy of its charter or act of incorporation, together with a statement under the oath of the President and Secretary of said company, showing the condition of the affairs of said company. (Sec. 5969.)

If the statement is satisfactory to the Superintendent, he gives the company a license to do business in the State for a year, and on each year on examination of the statement, if satisfactory, he renews the license for another year. (Sec. 5974.)

No company is allowed to do business without such license, a copy of which is required to be kept by each agent. (Sec. 6011.)

Nor is any company permitted to transact insurance business in the State without first fully complying with all the provisions of law governing the business of insurance. (Sec. 6012.)

By Sec. 6013, every company not incorporated under the laws of the State, desiring to transact any business in the State, shall also first file with the Superintendent of the Insurance Department, a written power of attorney appointing and designating some person, resident of the State, as attorney for service of all process, and consenting that service of process on any such agent or attorney shall be held as valid as if served on the company.

Sec. 5976. "No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons shall be deemed material, or render the policy void, unless the matter misrepresented shall have

actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case, shall be a question for the jury."

Sec. 5977. "In suits brought upon life policies, heretofore or hereafter issued, no defense based upon misrepresentation in obtaining or securing the same shall be valid, unless the defendant shall at or before the trial, deposit in Court for the benefit of the plaintiffs, the premiums received on such policies."

Under this law, the plaintiff in error, a New York corporation, was in 1877, and to this date, licensed under the laws of Missouri, as a foreign life insurance company, to do business in that State, the license having been issued on its application. (See Trans. p. 24.) Such license being in force, the plaintiff in error, by its agents, in Dec., 1877, at St. Louis, solicited Chinonda S. Alford, a citizen of St. Louis, where he had resided since 1866, to take out a policy with it. Alford consented, and about Dec. 22, 1877, a policy was delivered to him by the agent of the plaintiff in error at St. Louis, and the first premium paid on it at St. Louis, to the agent who had solicited it.

By this policy, of date Dec. 22, 1877, (see Trans. pp. 27 to 29,) it is set out that in consideration of the statements and representations in the application therefor, and of the premium of $263.80 then paid, and of the like premium to be paid annually thereafter, the New York Life Insurance Company, insured the life of said Chinonda S. Alford, in the amount of ten thousand dollars, for the term of his natural life, commencing on the 22nd of December, 1877, which sum it promised to pay to Alford's legal representatives in 60 days after due notice and satisfactory proof of the death of Alford during the continuance of the policy.

Alford paid three premiums on the policy, the last on December 22nd 1879, (see Trans. pp. 24, 25,) which continued it in force till December 22nd, 1880, and died at his residence at the City of St. Louis, September 24, 1880. (See Trans. p. 24.)

Gov. Thos. C. Fletcher qualified as executor, and on Dec. 14th, 1880, (see Trans. p. 26) filed with the plaintiff in error due notice and proof of the death of Alford, to the form and matter of which no objection was made, but the plaintiff in error, disputing its liability on other grounds, refused to pay. Sixty days having elapsed after filing the proofs, and payment not having been made, the defendant in error, as such executor, on April 21st, 1881, commenced this suit in the Circuit Court of the City of St. Louis, to recover the $10,000, and interest thereon from Feb. 14th, 1881, the end of the 60 days after notice and proof, as also for costs and damages for vexatious delay in payment of the loss.

Service was had under Sec. 6013, above referred to, on the attorney for service, the company appeared and answered, and then removed the case from the State to the National Court, on the ground of citizenship. In this Court the defendant below filed an amended petition. (See Trans. p. 9.) It is in the usual form; the only averments in it demanding special notice here being, that the plaintiff in error was, at the date of issue of the policy, engaged in transacting the business of life insurance in Missouri, under the rights and subject to the liabilities conferred and imposed upon it by force and virtue of the laws of Missouri, and under license obtained by it so to do; that Alford made application for insurance in the company at the solicitation of an agent thereof, on a printed blank filled up by the agent, and on December 26th, 1877, at St. Louis, received from the said

agent the policy sued on; that he afterwards paid all renewal premiums thereon to the said agent, at St. Louis.

An amended answer was filed, (see Trans. p. 11) admitting incorporation under the laws of New York, admitting that Gov. Fletcher was executor, admitting the execution of the policy, but denying generally, all other averments.

The amended answer then sets up the defense in two forms:

The first, founded on the theory that all statements in the application were warranties, and that whether material or not to the risk, rendered the policy void if untrue.

The second, founded on the provisions of Sec. 5976 of the Missouri law, heretofore quoted, that misrepresentations were made in obtaining the policy which were as to matters which actually contributed to the contingency or event on which the policy was to become due and payable, and that therefore the policy was void.

The misrepresentations or false statements relied on by both counts were the same, namely, that the application contained the following question:

"No. 11. Has the party had or been afflicted since childhood, with any of the following complaints, * * * diseases of the liver, kidneys or brain?" To which Alford answered "No." It is averred that the answer was false and untrue; that Alford had, prior to said application, been afflicted with a disease known as a disease of the kidneys, to-wit: "diabetes." That in said question, No. 11, he was also asked if he had ever had any serious disease, and had answered "No," when he had had a serious and dangerous complaint known as "diabetes."

That he had been asked in the application by question No. 27, to give name and residence of his usual medical at-

tendant, and had answered, "Have none." It is averred that the answers were not only untrue, but that the disease concealed was the one from which he died, and that by concealing the fact that he had been treated for that by Dr. Brokaw, his usual medical attendant, he had prevented the company from ascertaining the fact that he had had the disease.

It is also averred that it was expressly stipulated in the application that no statements, representations or information made or given by or to the person soliciting or taking the application, or to any other person, shall be binding on the company, or in any manner affect its rights, unless such statements, representations or information be reduced to writing and presented to the officers of the company, at the home office in the application.

The reply (see Trans. pp. 14-17) in substance states [that in December, 1877, two of the agents of the plaintiff in error, Roeslein and Leydburg, who were personally acquainted with Alford, and aware of his past and present physical condition, came to him on several different occasions at his office in the city of St. Louis, and as agents of the defendant below, solicited him to take out a policy of insurance in the company. That on each and all of these soliciting visits, Alford told both and each of the agents that he did not beleive he was insurable, that they knew he had been in bad health, and knew he had been under medical treatment for diabetes; that he thought he was now well and free from the desease, but that the fact of his having had it, would, he thought, cause the company to contest liability on any policy it might issue to him, and he would be throwing his money away, said agents assured him that he was insurable; that the fact that he had had the disease made no difference, and that if he would take out a policy and pay the premiums as required therein, he would have no trouble whatever.

Finally, about the 18th of December, 1877, the said Roeslein and Leydburg, as agents of the company, came to Alford at his office in the City of St. Louis, and renewing their entreaties as aforesaid, prevailed on him to consent to take out a policy in their company. To that end, they then told him it would be necessary to have him answer certain questions as a matter of form. Thereupon, one of said agents proceeded to read out to said Alford questions in a printed blank thay had with them, and as Alford answered such questions, one of said agents pretended to take down and write in said blank in substance the answer given by him to each question, and to fill in the answers to said question in such manner and with such matter as he, said agent, saw fit, not reading over what he had written to Alford; nor consulting him as to what he had written, nor informing him of the effect of what he had written, but assuring Alford that the whole thing was a mere formality. When said agents came to the questions referred to in the amended answer as numbers 11 and 27, and to the general question as to Alford's medical history, Alford said to them, "you know all about my condition; you know I was sick and was under treatment by Dr. Brokaw for diabetes, and if you want to find out anything more about me, there is Dr. Brokaw's office," (pointing to a window exactly across the street from Alford's office, and pointing to Dr. Brokaw's office sign) "and there is his sign, he has been my physician for years, knows all about me, and you can go right over there and ask him everything you want to know."

That Alford having thus truthfully and fully answered said questions, the said agents of defendant below, without the knowledge of Alford, wrote the answer to question No. 11 "No," and the answer to question No. 27 "Has none," well knowing that the same were not the answers given by said Alford; that Alford did not know how the

said answers were taken down, and had no reason to believe that they were taken down falsely; that after said Alford had fully and truly answered all questions asked of him, he was asked by said agents of defendant to sign his name to the blank *to identify him as the party to whose use and benefit the policy was to issue*, and that for that purpose he signed his name twice to said paper, without reading it over, and without reading the answers inserted in it by defendant's said agents, and without any knowledge that the said agents of defendant below had inserted answers to the questions other than the ones he gave. That at the same time said agents had Alford examined by the medical examiner of the company who was present. That said agents did not read over to the said Alford any other parts of said application except the questions; did not read over to him the particular clause set out by the defendant's amended answer limiting the authority of the agents, nor in any way call his attention to the fact that his signatures were intended as an acceptance or assent to the said clause. "And plaintiff says that the answers given to questions 11 and 27 are not the answers of said Alford to said questions, but are the answers and statements of the agents of defendant.]

"Further replying, this plaintiff denies that the said Alford made, filled up or signed the application set out by defendant, or that he made the answers and statements contained in it. And he denies that the copy or what purports to be a copy of an application made by him is a true copy of any application made by him."

[The reply then avers that after the paper was signed by Alford, as aforesaid, the said agents of defendant took it, "and what disposition they made of it is unknown to plaintiff, but he avers that said Alford neither sent it to any officers of defendant at New York, or author-

ized any one to do so. That a short time afterwards one of the said agents of defendant, Roeslein, came to said Alford at his office in the City of St. Louis, delivered him the policy sued on, took from Alford his premium called for in said policy; that Alford, supposing the answers in the application were taken as given or were written to the satisfaction of defendant, did not read over the copy attached; did not read over the policy; but was told by said agent on delivering it that it was all right and he was insured, and said Alford paid no further attention to the matter."

That afterwards Alford paid to said agent Roeslein the annual premiums as they fell due, and that said Roeslein, as agent of defendant, with full knowledge that the answers as written on said application were not the true answers given by Alford to said questions, accepted, demanded and received from Alford the annual premiums and informed Alford that his insurance was safe, and that said agent did this as agent and with full knowledge of all the facts. "Plaintiff says that by the acts of the defendant as aforesaid in the premises, the said defendant is estopped from now pretending that any of the answers as written render said policy void."]

The reply further denies that the answersof Alford, even as written to the said questions, were false in so far as relates to his having had any disease of the kidneys; he denies that Alford had at any time disease of the kidneys; nor is it true that when said application was made Alford had disease of the kidneys, nor any other serious disorder; nor is it true that he then had or prior thereto had had any disease which contributed to or was the immediate cause of his death, or that he died of any disease of the kidneys, or of any disease which he before then had. "And plaintiff denies that said Alford made any misrepresentations in securing said policy, which in any manner actu-

ally contributed to the contingency and event on which the policy became due; and he avers that even if the answers as given by Alford had been correctly written down, and all the facts set out in the application, yet, notwithstanding that, the defendant below would have insured him, and would have considered him a good risk, nor is it true that the fact that he had before been treated for diabetes, or had had that disease and had had a regular physician, in any manner or degree contribute to the contingency or event on which the policy became due; and he avers that said Alford, in December, 1877, had been, and was for a long time prior thereto, entirely free and cured of said disease; that he had no traces whatever of it in his system, and that the disease of which he died attacked him long after he took out said policy and within about three months of his death."

Plaintiff in error demurred to all parts of the reply which we have placed in brackets [ ], for the reasons, 1st, that the matters stated are no defense; 2d, they are mere statements of evidence.

The demurrer was overruled. (See opinion, pages 21-23, Trans. The sections of the insurance law particularly referred to are sections 5976 and 5977).

There was no further pleading, as under the Missouri Practice Act, (Rev. Stat. 1879, Secs. 3526, 3545), the reply puts the cause at issue, and all allegations of new matter are deemed controverted by the adverse party, as upon a direct denial or avoidance.

The case was tried twice, once before his Honor, Judge Treat, and a jury; the charge on that trial is reported 11 Fed., Rep. 377; but for errors in the admission of evidence, the verdict, then also rendered for the defendant in error, was set aside (see 12 Fed., Rep. 557); on the second trial, before his Honor, Judge McCrary, and a jury, the following proceedings were had:

After proving the date of death of Alford, and reading the policy, and proving the date of filing proof of loss, and that all premiums ($792.40), had been paid, on receipts signed by Roeslein, the local, and W. L. Hill the general agent of the company, the plaintiff below rested.

Defendant below introduced in evidence, the proofs of loss, (Trans. pp. 34 to 39); the statement of Dr. F. V. L. Brokaw, the attending physician, which accompanies these proofs (see Trans., p. 36), showing that he had been his attending physician for about ten years, had once treated him for dysentery; had been afflicted with diabetes five or six years ago. He died of diabetes. "I first treated him for this disease about six years ago: he apparently recovered and had no symtoms of the disease for a period of three or four years."

Depositions of the actuary and vice-president of defendant, and of its chief medical examiner, were read. (pp. 40 to 44). They simply identify the application and certificate of the company's local medical examiner, (see Trans., pp. 44 to 52), and the letter of transmittal of same to the home office by local general agent, (see p. 52), and testify that the company acted, in issuing the policy, on the application and certificate. Neither knew Alford's hand writing; could not say in whose writing the answers were written.

William L. Hill, the general manager for the defendant, at St. Louis, testified (see Trans., p. 52), that he was the sole general manager and general agent at St. Louis; that the defendant had, besides himself, merely agents for the soliciting of applications; he sent the application for this policy to New York, and when the policy was received, delivered it to Mr. Roeslein for delivery to Alford.

At the conclusion of Hill's testimony in chief, the defendant tendered to plaintiff, in open Court, $888.26, the

premiums received, under sections 5976 and 5977, of the Mo. Stat.; plaintiff declined the tender. (See Trans., p 53).

On cross-examination, Mr. Hill stated that Roeslein had collected all these premiums.

Dr. Baumgarten, the examining physician for defendant below, was examined. (Trans. p. 54). He testified as to what "diabetes" is; considers it a serious disease; that it eventually leads to death, and is incurable. It is not a disease or affection of the kidneys (p. 57), but a disease of nutrition. Does not remember examining Alford; states his mode of ordinarilly conducting an examination.

On cross-examination admitted he did not remember this particular case at all. Testified that a man might have "diabetes" and not know it, or have had it and honestly suppose he was completely cured (Trans. p. 62). Will not say whether in this case he got the answers from Alford or copied them from the application that Roeslein had. (P. 63.)

Defendant then offered in evidence application made by Alford to the Penn Mutual Life Ins. Co. for $5,000 insurance in that company, which it was admitted was made by Alford *on the same day he applied for the policy now sued on*, but he made the application to the "Penn" in the forenoon and to defendant in the afternoon. In this application to the "Penn" Alford states (see Trans, p. 64) that he had been afflicted with kidney disease in 1875; had been attended about two years before by Dr. Brokaw for kidney disease. To this application is Dr. Brokaw's certificate (Trans. p. 70), which states that Alford had never been afflicted with any disease except kidneys and that is cured. Attended him for diabetes about two years ago and has made frequent examination for sugar in the urine since, but never found a trace.

It also appeared that when this application was sent on to the home office of the "Penn" that company *did not decline to insure Alford, but required him to amend his application by changing the form of the policy he applied for from a life policy to a fifteen year endowment policy, he paying the increased rate for that form, and thereupon that company issued him a 15 year endowment policy.* (see Trans. p. 64.)

Mr. Hill re-called (pp. 72 to 74) attempts to explain the basis for taking endowment policies instead of ordinary life.

In rebuttal plaintiff introduced Dr. C. H. Hughes as a medical expert (see pp. 75 to 80). He testifies that diabetes is not a disease of the kidneys—gives a full account of it; thinks it impossible for diabetes to remain latent for five years; if a man died of it—having once had it and no symptoms of it for four or five years,—would regard it not a continuation of the disease, but a second attack of it.

Mr. S. M. Pearman was then examined. He had been employed continuously by Alford for the five or six years preceding his death, (see Trans. pp. 80 to 87); was present in Alford's office when he made the application for this policy. It is sufficient to say of Mr. Pearman's testimony that it tended to prove the facts set up in the reply connected with the filling up of the application.

Mr. Warner also gave evidence to the same effect. (Trans., p. 87.)

In sur-rebuttal defendant read the testimony of the soliciting agent, Roeslein (see Trans., p. 90.) It is chiefly remarkable for what it does not contain. There is no denial in it of Mr. Pearman's direct testimony. It also shows that Roeslein was the only agent or representative of the company known to Alford in the transaction.

Defendant asked various instructions, which were refused as asked, the Court covering all the points in its charge to the jury (see Trans., p. 96.) A verdict was rendered for plaintiff for the full amount and interest, which was followed by judgment.

BRIEF AND ARGUMENT.

FIRST.

The contract of insurance in this case is a Missouri contract and to be determined by the laws of that State.

(a.) The cause of action undoubtedly accrued in Missouri, where the death occurred.

Rippstein, et. al. vs. St. Louis Mutual Life Ins. Co., 57 Mo., 86.

(b.) As the New York Life Ins. Co. could only do business in Missouri on terms prescribed by the laws of Missouri (Paul vs. State of Virginia, 8 Wall., 168), when it issued policies or did business in that State, it subjected itself to the laws thereof, and its contracts of insurance, made under the license granted it by the State to do business therein, are to be interpreted according to the laws of Missouri. Its policies, solicited by its agents in Missouri, are entered into and accepted by the citizens of Missouri, with a view to the local law, and are to be interpreted thereunder.

Pritchard vs. Norton, 106 U. S., 124.
Bank of Augusta vs. Earle, 13 Peters, 519.
Taylor vs. Holmes, 14 Fed. Rep., p. 505.

(c.) The National Courts in Missouri have so held, ever since sections—5976 and 5977 of the Rev. Statutes of 1879, which are sections 1 and 2 of the Act of March 23, 1874—have been in force.

White vs. Conn. Mut. Life Ins. Co., 4 Dillon, 177.
Fletcher vs. New York Life Ins. Co., 13 Fed Rep., 526, (the opinion in this case on the demurrer to the replication.)

(d.) As was said by the Supreme Judicial Court of Massachusetts, in 1880, in case Holmes vs. Charter Oak Life Ins. Co., 131 Mass., 64, "By doing business in the Commonwealth on the terms prescribed by statute as to the appointment of agents to accept service of process, and in other particulars, the defendant corporation accepted for itself, and agreed to be subject to, all the provisions of statutes relating to the business of foreign companies done in this Commonwealth, or with persons resident here. All contracts for insurance thereafter made with residents here were subject to the terms of the statutes, and must be construed with those statutes in view, without reference to the question whether they were in fact made in this State or in Connecticut. It would be a strange construction which should permit companies which had availed themselves of the privileges of the statute, to escape the obligations and liabilities imposed by them by making and delivering their policies out of the State, when, by its express terms the statute applies to all contracts made with residents of the State. * * The point which we decide is, that by accepting the permission given by the statutes to do business in this Commonwealth, the defendant became bound by the condition attached to the privilege that all policies issued by it to residents of this Commonwealth should be subject to the provisions of the Statute of 1861, C., 186, known as the "non-forfeiture law."

It therefore follows, that sections 5976 and 5977, of the Rev. Stat. of Mo., apply to this contract, and under them it is to be noted; 1st, That the doctrine of warranties, as understood in insurance contracts, is done away

with, and misrepresentation is not to be deemed material, unless the matter misrepresented actually contributed to the loss, which is to be determined by the jury, (see sec. 5976); nor, 2d, shall such defense be available, unless the defendant at or before the trial, tenders or returns the premiums received. (See sec. 5977).

See White vs. Conn. Mut. Life, *supra*.

The plaintiff in error, by the brief of its counsel, argues that it is immaterial, in this case, whether this was a contract which falls under the Missouri law or not, as it was conceded by the charge of the Court, that the single issue in the case was one of fraud.

Without accepting that as correct, we have stated the position of the lower Court on the point, and supported it by authority, for three reasons:

1. That it is important to have the question settled, as it is constantly arising, and if this case is reversed, will again arise in it.

2. It is material in determining whether the action of the Court, in overruling the demurrer was correct, and whether that part of the charge, relating to the tender of premiums, is correct.

3. It is also material, for if our position is correct, then the third condition in the policy (see Trans. p. 28), that when it ceases and determines, or becomes null and void, all payments previously made shall be forfeited to the company, is contrary to this law and of no effect.

It also disposes of the 1st and 10th assignment of error.

SECOND.

The main question presented by the case is, whether the clause in the application and in the policy, to the effect that no statements, representations or information made or given

by or to the person soliciting or taking the application, or to any person, shall be binding on the company, or in any manner affect its rights, unless such statements, etc., be reduced to writing and presented to the officers of the company at the home office, in the application referred to, is such a notice to the applicant, or to the insured, of the limitation of the powers of the soliciting agent, as exempts the company from responsibility and liability on the policy, when the solicitor is proved to have fraudulently inserted wrong answers, and concealed the fact that he had done so from the applicant.

As to this, it is respectfully submitted, that this clause is nothing more than an attempt to make the solicitor the agent of the applicant, instead of the agent of the insurer, and that it falls within the principle of the cases of

Insurance Co. vs. Wilkinson, 13 Wall. 222.
Insurance Co. vs. Mahone, 21 Wall. 152.
N. J. Mut. Life vs. Baker, 94 U. S. 610.

In the note to Carpenter vs. Washington Ins. Co. in 2 American Lead. cases (5th Ed. p. 919), the rule is stated thus:

"Whatever the rule may be under ordinary circumstances, it would seem clear that when the duty of preparing the policy is, as generally happens, assumed by the insurers, they cannot take advantage of the failure of the instrument to express any fact or circumstance that has been duly communicated by the insured, and omitted through negligence or design by their officers or agents. * * And the principle is the same where the error or mis-description occurs in an application or survey, which, though nominally proceeding from the insured, is, in fact, prepared or dictated by an agent of the insurance company."

The same author, see page 921, says, "a man who employs the agent of another makes him his own, and may be

as much bound by what he does as if he had no other principal; and such is manifestly the rule when the policy contains a provision that the agent through whom the insurance is effected or application is made, shall be regarded as the agent of the insured, and not of the insurer. There are, however, other and collateral truths which should be kept in view in cases of this description. It has been held, and is well stated, that a principal is liable for the fraud of his agent in the course of the business intrusted to his care; and it will not be an answer that he did not authorize the fraud, if he authorized the act in the course of which the fraud was committed. And it would seem that a man cannot adopt or profit by a contract without becoming responsible for the means through which it was procured, although they may have been used without his knowledge or contrary to his express commands. He may, no doubt, return what he has received within a reasonable time, and rescind the contract; but this cannot be done after a breach has occurred, and when it is too late to restore the other party to his original position."

The authorities supporting the above propositions are numerous, and are fully collated in the work referred to.

> See also Bliss on Life Insurance, 2nd Ed., § § 76-81.
> Ibid, § § 290-297.

In the summary of the law on this point, which this author gives, particularly in sections 82 and 296, he states that the decisions of the Courts, in later cases, hold the companies responsible for the knowledge of their agents. In the last cited section (296), he argues that, on principle, the rule now adopted by the Courts is not correct. But he expressly admits of an exception. To use his own language, "*unless the insured can show that some fraud or device was used to prevent him from acquainting himself with the contents*, he should be bound by the statements be-

neath which he writes his signature." Again, in section 297, the same author says: "Where the application expressly provides that the insurers are not to be bound by any acts done or statements made to or by the agent, unless they are contained in it, the company is not bound, though the agent fills up the application and omits to state material matter, which was known to him, *if there is no fraud on his part, and if he does not prevent the applicant from stating the omitted facts.*"

In the sections cited by counsel for plaintiff in error, from May on Insurance, the same exception to the rule is noted.

Thus in section 137, it is said, "the knowledge by the agent of a fact not stated in the application in that case, (where the insured had stipulated in the application, that the insurer shall not be bound by statements made to the agent not contained in the application,) becomes entirely immaterial, *unless possibly when the statement of the fact may have been fraudulently prevented by the agent.*"

Again, in sections 140 and 141, also cited by counsel, the same author, after stating the general rule to be that where the policy provides that the company will not be bound by anything said by the agent, not contained in the application, says, that even "such an agent may so conduct his business as to estop the company he represents from denying the truth of the statements made in the application." May on Insurance, 2nd Ed., § § 136-144.

Says the same author, section 143: "It has, in fact, been very generally held that knowledge by, or notice to, the agent, of the inaccuracy of a statement in the application upon which the policy is issued after such notice or knowledge, binds the company; * * * *and this is true, even though the policy provide that when the application is made*

through an agent of the company, the applicant shall be responsible for such agent's representations."

Much more should that be the case, when, by the active fraud of the agent, the application is made to contain answers directly contrary to those given by the applicant, and that without any connivance of the applicant.

Under this view of the law the lower Court, in this case, committed no error in that part of the charge specially assigned as error number 7, nor in the admission of evidence as to the transaction connected with the taking of the application.

This is an attempt, by means of a printed formula, not shown to have been called to the attention of the applicant, but judging from the testimony, probably never read over to him, to escape responsibility for the acts of the only representative of the company known to Alford, the agent of the company sent out to solicit risks.

It is to be remembered that Roeslein was the person who solicited the risk, who delivered the policy, who collected the first premium and the subsequent renewals. So far as Alford was concerned, Roeslein was the company. Roeslein knew of the fraud he had perpetrated on Alford.

Alford did not write any of the answers; they were all written by the solicitor for the company. (See Trans. pp. 90 and 91.)

He delivered it, for the company, to Alford, with full knowledge of facts upon which its velidity could be disputed;—"then to insist upon these facts as grounds of avoidance, is to attempt a fraud."

May on Ins., 2d Ed., Chap. 22, § 497, *Ibid.*, § § 498, 499.

THIRD.

Roselein continued, as agent of plaintiff in error, to receive the premiums. He knew of the false statements in the application, but notwithstanding that knowledge, went on receiving the premiums. His act estopps his principal, the plaintiff in error.

Wing vs. Harvey, 27 Eng., L. & E., 140.

Ins. Co. vs. McCain, 96 U. S., 84.

Notwithstanding the clause in the policy, he was the agent of the company in soliciting the insurance and in collecting the premiums. These matters are within the scope of his agency, and the company is bound by his acts.

Bliss on Life Ins., 2d Ed., § 81.

Conn. Ins. Co. vs. Ives, et. al., 56 Ill., 402.

Also cases, *supra*.

Also May on Ins., 2d Ed., § 142.

The company selected him; it is the one to bear the consequences of his fraud.

Ætna Ins. Co. vs. Maguire, 51 Ill., 342.

FOURTH.

The second point made by counsel for plaintiff in error, in their brief, that the written application was the sole basis of the contract, and that to avoid the effect of false statements in that, and recover notwithstanding their insertion, is to recover on a new and different contract, is a point always made by counsel for the insurance companies in cases of this kind.

A notable instance of that is the very able brief of counsel in the Wilkinson case (13 Wall.), at pages 227 to 229. But this Court has there settled the point against plaintiff in error. See also Bliss. Life Ins., 2nd Ed., § § 80, 81.

FIFTH.

In the Mahone case—*supra*—it was in evidence that the answers, as taken down by the agent, were read over to the applicant, and that he then signed the application, knowing that the answers were so taken down. Says the Court: "Nor do we think it makes any difference that the answers, as written by the agent, were subsequently read to the appilcant and signed by him. Having himself answered truly, and the agent having undertaken to prepare and forward the proposals, the insured had a right to assume that the answers he did make were accepted as meaning for the purpose of obtaining a policy, what the agent stated them in writing to be."

This is an answer to the 9th assignment of error, and the third point presented by plaintiff in error.

SIXTH.

The case of Ryan vs. World Mut. Life Ins. Co., 41 Conn., 168, cited by counsel for plaintiff in error several times, is in direct conflict with the law, as laid down by this Court, in the Wilkinson, Mahone and Baker cases, *supra*. Counsel, however, seem to emphasize the quotation from the opinion of the Court in the Ryan case, that "had the truth been stated, *no policy would have been issued.*"

But in the case at bar, the plaintiff in error proved by its own witnesses, that when Alford's answers were taken down by the agent of the Penn, that company *did not reject him, but gave him insurance* at a higher rate and a different plan, *and Alford acceeded to the change.*

SEVENTH.

The case of Loehner, et al., vs. Home Mut. Ins. Co., 17 Mo., 247, which is also quoted by counsel and frequently referred to, rests in great part on the point that "by the

terms of the charter, every person, causing himself to be insured, becomes a member of the company," p. 251, and that "the charter made the policy void." P. 256. Furthermore, that case (decided in 1852), as to the point on which it is cited, is no longer the law in this State. On the contrary, since 1867, the Supreme Court has followed the line of decisions of which Plumb vs. Cattaraugus Mut. Ins. Co., 18 N. Y., 392, is a type, and distinctly repudiated it.

See Horwitz vs. Eq. Mut. Ins. Co., 40 Mo., 557.
Franklin vs. The Atlantic Fire Ins. Co., 42 Mo., 456.
Combs vs. Hannibal S. & I. Co., 43 Mo., 148.
Hayward vs. Natl. Ins. Co., 52 Mo., 181 .

In the case of Franklin vs. Ins. Co., *supra*, "*the policy* contained a condition, that 'if any person effecting insurance in this company shall make any misrepresentation or concealment touching the right to be assured,' the policy should be void; and also another, that 'if the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, it must be so represented to the company, *and so expressed in the written part of the policy, otherwise the policy shall be void.*'"

The interest of the assured was not correctly expressed in the written part of the policy, but the assured offered to prove that he had informed the agent of his interest, and the agent said, "that made no difference—it was all right."

In deciding the case, and holding that evidence of this should have been admitted, Judge Holmes uses this very emphatic language (p. 461):

"There is manifest justice in the application of the principle (of estoppel *in pais*) to a case like this. These foreign insurance companies may justly be held bound, to the fullest extent the law will allow, for the acts of their